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No. 88-2099

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JUGOMETAL ENTERPRISE FOR IMPORT & EXPORT OF ORES & METALS,
Petitioner

v.

MARCUS IRVING, JR. & FRANKIE IRVING,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF

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TABLE OF AUTHORITIES

CASES — Page

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1988) 3
Bean Dredging Corp. v. Dredge Technology, 744 F.2d 1081 (5th Cir. 1984) 3
Chicago, Milwaukee, St. P. & P.R.R. v. Acme Fast Freight, Inc., 336 U.S. 465 (1949) 1
International Shoe v. Washington, 326 U.S. 310 (1945) 5
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 3, 5

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REPLY BRIEF

I.

The Brief In Opposition is nothing more than a blatant attempt to mislead. Without any record support, Respondents equate Petitioner with a manufacturer or producer engaged in the business of "shipping" its "own products" to the port of Houston. As established in the Petition and left undisputed by the Brief In Opposition, Petitioner did not produce the product, was not its retailer or wholesaler and never had legal title or actual possession of it. At most, it performed the duties of what has historically been characterized as a forwarder of freight.[1]

[1] As described in Chicago, Milwaukee, St. P. & P. R.R. v. Acme Fast Freight, Inc., 336 U.S. 465, 484 (1949), those acting in this capacity

> arrange for the transportation by common carrier of the shipper's goods. The forwarder [does] not necessarily consolidate the individual consignments into carload lots, and its

The Special Master, District Judge and the lower court all agreed that the primary reason that Jugometal became involved in the Stragari/Huxley transaction was the fact that Yugoslavian law prohibited Stragari from exporting its own product.[2] It remains uncontested that the only reason Petitioner entered into a contract designating itself as "seller" was to comply with Yugoslavian law; that a second contract was entered into with Stragari, and that the latter rendered Stragari responsible under terms and conditions identical to those it would have undertaken but for the legal requirement that it employ an exporter licensed by the government of Yugoslavia.[3] It is also agreed that Jugometal never took actual possession or had legal title to the asbestos and that its gross income for the facilitating role it played in the Stragari/Huxley transaction over twenty-five years ago generated somewhere in the neighborhood of $2,500 to $3,750 per year.[4] Petition for Certiorari 4. Finally, laying aside inappropriate conclusory language employed in the Brief In Opposition,[5] the critical issue which brings this case to

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> duties, as agent of the shipper, [go] no farther than procuring transportation by carrier and handling the details of shipment. Forwarders of this type charge . . . fees for their services, which the shipper [pays] in addition to the freight charges of the carrier utilized for the actual transportation.

[2] App. 2a, 41a, 48a (adoption of findings of Special Master).

[3] Included were provisions ensuring that Stragari (not Jugometal) would be responsible for expenses incurred after title to the asbestos passed from Stragari to Huxley, *e.g.*, bag cleaning and testing. *Cf.*, Brief In Opposition 10 n.4 (acknowledging proposition that Jugometal was mere conduit for passage of funds from Huxley to Stragari).

[4] Income derived from the transaction is far less than that now expended to contest the jurisdiction of the district court.

[5] After characterizing Petitioner as a "foreign supplier," in the Questions Presented, Respondents argue a proposition finding no support in the opinions below or the record, that is, Jugometal "sold" and "shipped" "its products" to Houston. Brief in Opposi-

the certiorari stage remains the same as when the district-court determined that there was no jurisdiction: By signing the contract with Huxley (on behalf of Stragari), which included provisions with respect to testing and bag cleaning in the port city of Houston, and by fulfilling its obligation to arrange transportation from Yugoslavia to that port,[6] was Petitioner's "conduct and connection with the forum State . . . such that [it] should reasonably [have] anticipated being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980).

Reversing the Special Master and District Judge, the lower court found "no clear guidance" [7] from *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1988). Although there was no corporate activity by Petitioner in Houston, it concluded that "out-of-state activities can establish the necessary minimum contacts if those activities have 'reasonably foreseeable consequences' within the forum state." App. 7a.[8] As pointed out in the Petition for

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tion 2, 5. As explained in the Petition, Stragari and Huxley were the only entities having legal title and possession of the asbestos. Petition for Certiorari 4. At no point in the transaction did Petitioner have a relationship with the product warranting the characterizations employed by Respondents.

[6] Next to New York and New Orleans, Houston is the third largest commercial port in the United States. THE WORLD ALMANAC & BOOK OF FACTS 186 (1989).

[7] App. 6a.

[8] Citing Bean Dredging Corp. v. Dredge Technology, 744 F.2d 1081, 1083 (5th Cir. 1984). In addition to a clear rejection of the "stream of commerce" approach taken in *Bean Dredging* by four members of this Court in *Asahi*, the factual predicate, as applied to the instant case, is also erroneous. This case does not involve the mass distribution of a product that could wind up "anywhere." App. 9a. Rather, it involves a sale with the understanding that the product in question was to be used by only one business, the identity of which was withheld from Petitioner.

Certiorari, the determination that jurisdiction was properly asserted, brings directly into question the correct application of the "foreseeability" test as advanced by Justice Brennan, Petition For Certiorari 9 n.12. In addition, it squarely raises the issue of most pressing concern to the lower courts: after the four-four division in *Asahi*, does the Due Process Clause require certain "additional conduct" in the forum state before jurisdiction attaches?

Concerns of "fairness," *e.g.*, the passage of twenty-five years, destruction of corporate records pursuant to Yugoslavian regulations and the *de minimis* compensation which Petitioner received, played no part in the lower court's analysis. Moreover, in light of the near unanimous agreement in *Asahi* as to the importance of international ramifications, Respondents' contention that the lower court's "silence [on this issue] was well-considered" [9] is especially inappropriate.

Petitioner's involvement in the case was a direct result of compliance with provisions of Yugoslavian law. It was for this reason alone that Petitioner, a licensed exporter and acting only as an agent for Stragari, was designated as "seller" [10] in the contract with Huxley. But for the peculiar requirements of Yugoslavian law there would be no colorable claim as to jurisdiction. Accordingly, Yugoslavia's concerns as a sovereign with respect to its own laws and methods of engaging in international trade are now at risk. This case should, at the very least, be reviewed by this Court to explore the impact of international concerns on jurisdictional concepts as applied to foreign entities operating under the laws of their own countries.

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[9] Brief In Opposition 11.

[10] It is not disputed that at the time of entering into the 1959 contract, officers of Jugometal did so with the knowledge that pursuant to common business practices then in effect in Yugoslavia, the company was acting as an agent for Stragari.

II.

Since the decision in *International Shoe* v. *Washington*, 326 U.S. 310, 316 (1945), the concept of "fair play and substantial justice," requires that the relationship between a defendant and the forum be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." *World-Wide Volkswagen*, *supra* at 292. This case demands application of these principles in the context of putting in place definitive guidelines for those engaged in international trade. For the reasons set forth in the Petition and Reply Brief, the writ of certiorari should issue.

Respectfully submitted,

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